

Bayon BAKO
against
WAEMU Commission

"Contract staff - Community law - Action for damages for unfair dismissal -
Inadmissibility - Time-barred".

Summary of the
judgment

UEMOA contract staff are governed by Regulation n°02/95/CM of 1^{er} August 1995 on the conditions of employment of UEMOA non-permanent staff.

In order to be admissible, "the appeal must be lodged with the Court within a period of two months, counting from the date of expiry of the time limit for reply, where the appeal relates to an implied decision of rejection.

REPORT BY THE JUDGE-RAPPORTEUR

By application dated 24 February 2003, registered at the Registry of the WAEMU Court of Justice on 26 February 2003 under no. 02/03, Mr Bayon BAKO, a labourer at the WAEMU Commission, through the firm SANKARA-DIALLO, lawyers at the Court of Ouagadougou, Burkina Faso, brought an action for payment of the sum of five million (5,000,000) francs in damages for unfair dismissal.

The request was served on the WAEMU Commission on 23 April 2003.

It should be recalled that by a first application dated 26 September 2002, Bayon BAKO, represented by Maître Issa H. DIALLO, brought an action against the WAEMU Commission seeking an order to pay him the sum of five million (5,000,000) francs by way of damages for unfair dismissal. In the course of the proceedings and at the request of the applicant, the President of the Court of Justice issued an order to strike out the case on 19 February 2003 on the grounds that the proceedings had been discontinued.

I. THE FACTS

Mr Bayon BAKO was recruited as a labourer at the headquarters of the WAEMU Commission under a fixed-term contract concluded on 16 April 1997 between the President of the Commission and him, in accordance with Regulation No 02/95/CM of 1^{er} August 1995 on the regulations applicable to non-permanent staff of the WAEMU.

Prior to the termination of the said contract, the Acting Director of the Secretariat of the WAEMU Commission sent him a letter of request for explanation dated 28 November 2001 because he was often late for work.

In response, by letter dated 28 November 2001, Bayon BAKO pointed out that the delays of which he was accused were untrue or exaggerated, or were justified by the fact that the service sent him, in certain circumstances, to look for tickets at travel agencies.

II. PROCEDURE AND CLAIMS OF THE PARTIES

The claimant bases his action on the following provisions:

- Article 27 of Additional Act No. 10/96 of 10 May 1996 of the Conference of Heads of State and Government on the Statute of the WAEMU Court of Justice, which gives the Court jurisdiction to hear disputes between the Union and its agents;
- Article 107 et seq. of Regulation No. 01/95/CM on the Staff Regulations of Officials of the WAEMU, relating to appeals by officials;
- Article 15, paragraph 5 of Regulation No. 01/96/CM on the Rules of Procedure of the Court of Justice of the WAEMU relating to non-contractual liability of the Union and compensation by the Union for damage caused by it either through its material acts or through the normative acts of its organs;
- Article 26 of the Procedural Rules ;
- Article 16 of Additional Protocol I on the supervisory bodies of the WAEMU ;
- article 61 of Regulation n°02/95/CM of 1^{er} August 1995 on the conditions of employment of non-permanent staff of the WAEMU.

III. ON ADMISSIBILITY

The UEMOA Commission, through its counsel, Maître Harouna SAWADOGO, avocat à la Cour, considers that Mr Bayon BAKO's application must be declared inadmissible on the grounds that the application was made by his lawyer in violation of articles 107 et seq. which give it a personal character and, for non-respect of the hierarchical channel.

It also points out that the applicant did not identify the subject of the request and did not allow the relevant Commission bodies to analyse his complaint objectively.

To justify the admissibility of his claim, Mr Bayon BAKO relies on the general principle of law according to which "a lawyer is entitled to represent any person before the courts".

He also maintains that there is a match between his informal appeal and the contentious appeal because they both concern compensation for the loss he suffered as a result of his unfair dismissal by the WAEMU Commission.

It should be noted that the contested decision to dismiss, dated 6 February 2002, took effect on 8 February 2002.

On 3 April 2002, Mr Bayon BAKO, through his counsel SANKARA- DIALLO, lodged an informal appeal with the Chairman of the Commission, who did not react. On 20 August 2002, he referred the matter to the Joint Consultative Arbitration Committee for the same purpose. Article 61 of Regulation no. 02/95/CM of 1^{er} August 1995 stipulates, among other things, that an appeal must be lodged with the Court within a period of two (2) months from the date of expiry of the time-limit for reply, where the appeal relates to an implied decision of rejection. The question therefore arises as to whether, in lodging his appeal on 26 February 2003, Mr BAKO did so within the required time-limit.

In addition, the Court must note that Bayon BAKO was a contractual agent in service at the headquarters of the WAEMU Commission. As such, he is statutorily subject to the regime applicable to non-permanent staff of the WAEMU as provided for by Regulation n°02/95/CM of 1^{er} August 1995.

IV. AT THE BOTTOM

In order to obtain compensation, Mr Bayon BAKO stated that the number of delays of which he was accused was false and that this could be explained by the poor relations between him and the security guard in charge of recording the delays. The delays that he acknowledges were justified by the fact that he was sent to collect tickets from travel agencies during meetings of the Council of Ministers or the Committee of Experts; his dismissal without any real and serious grounds is unfair and entitles him to compensation.

Maître Harouna SAWADOGO, on behalf of the WAEMU Commission, replied that the award of damages always follows the trilogy of fault, causality and loss suffered; in this case, the Commission based its dismissal on serious fault constituted by the repeated delays acknowledged by the applicant.

It is settled case law that "the jurisdiction of the Community court is limited, where it is seised of an action for compensation, to verifying whether the conditions for obtaining compensation have been met, namely fault, damage and causal link".

The Judge-Rapporteur :

Yousseuf ANY MAHAMAN

OPINION OF THE ADVOCATE GENERAL

I. FACTS AND PROCEDURE

A. The facts

By decision dated 06 February 2002 of the President of the Commission of the West African Economic and Monetary Union (WAEMU), the duties of Mr Bayon BAKO, labourer in service at the headquarters of the said Commission in Ouagadougou, were terminated with effect from 08 February 2002.

The notice of this decision, which imposes a disciplinary sanction of dismissal on Mr Bayon BAKO, states that his employment was terminated for serious misconduct consisting of repeated lateness in the service.

Mr Bayon BAKO was recruited as a labourer at the headquarters of the WAEMU Commission under a fixed-term employment contract concluded on 16 April 1997 between the President of the Commission and him, in accordance with Regulation No 02/95/CM of 1^{er} August 1995 on the regulations applicable to non-permanent staff of the WAEMU.

Prior to the termination of Bayon BAKO's employment contract with the WAEMU Commission, the Acting Director of the WAEMU Secretariat sent Bayon BAKO a letter of request for explanation dated 28 November 2001.

In this letter, the Acting Director of the UEMOA Commission Secretariat informed Bayon BAKO that he had noticed that Bayon BAKO very often arrived at work after normal working hours.

In the terms of the letter, the author pointed out that he had been relieved for :

- July 2001: fifteen (15) overdue items;
- August 2001 twenty (20) delays;
- the month of September 2001 fourteen (14) delays.

The Acting Director of the Secretariat of the WAEMU Commission then asked Bayon Bako to provide him, within 24 hours, with the reasons for this attitude, which was detrimental to the smooth running of the Commission's services.

In response to the letter of explanation sent to Bayon BAKO by the Acting Director of the Secretariat of the WAEMU Commission, Bayon BAKO, in a letter dated the same day (28 November 2001), refuted all the allegations made against him. According to the terms of his letter, he pointed out that:

- that the number of delays of which he was accused was false because he (Bayon BAKO) was on bad terms with the security guard who had noted the said delays;
- that he had often arrived late, but that these delays were justified insofar as, when meetings of the Council of Ministers and the Committee of Statutory Experts were held, he was sent to travel agencies to collect travel tickets and the documents relating to these tickets;
- that it was when he went out to collect the said tickets that the security guards recorded his name on his return;
- that on days when he had to go to pharmacies to buy medicines for his child because he was ill, the security guards took down his name.

B. The procedure

By application received at the Court Registry on 26 February 2003, Mr Issa H. DIALLO, a member of the Ouagadougou Bar and a partner in the Sankara-Diallo law firm, acting in the name and on behalf of Bayon BAKO, brought an action against the WAEMU Commission before the Court, requesting the Court to declare the dismissal unfair and to order the Commission to pay him the sum of five million (5,000,000) francs by way of damages.

In support of his claim, Maître Issa H. DIALLO maintains that the disciplinary sanction of dismissal imposed on Bayon BAKO for serious misconduct was wrongly decided in that it

was based on alleged delays and that, having considered Bayon BAKO's dismissal to be without any real and serious basis according to abundant and constant case law, he undertook to claim damages by letter addressed to the President of the WAEMU Commission on 03 April 2002.

It is important to place this case in its procedural context by pointing out that by application dated 26 September 2002, Bayon BAKO, represented by Maître Issa H. DIALLO, had previously brought this action against the WAEMU Commission to obtain an order that the latter pay him the sum of five million (5,000,000) francs by way of damages for unfair dismissal; that in the course of the proceedings, at the request of the applicant, an order to discontinue the proceedings was issued on 19 February 2003 by the President of the Court and that this case was then struck out at that hearing (in chambers).

II. DISCUSSION

Given that this action was brought before this court on 26 February 2003, which seems to us to be manifestly late, our conclusions will be devoted exclusively to the form of this case. We do not consider any discussion of the merits to be of interest.

As mentioned above, Bayon BAKO was a contract agent working at the headquarters of the WAEMU Commission in Ouagadougou. He was statutorily covered by the system applicable to non-permanent staff of the WAEMU, as set out in Regulation No. 02/95/CM of 1^{er} August 1995.

Subsequent to the order to discontinue the proceedings issued on 19 February 2003, Bayon BAKO lodged a new application with the Court seeking an order that the WAEMU Commission pay him the sum of five million (5,000,000) francs by way of damages for unfair dismissal.

After his employment contract was terminated on 08 February 2002, Bayon BAKO (represented by his counsel Mr Issa H. DIALLO), by letter dated 03 April 2002, lodged an ex gratia appeal with the President of the WAEMU Commission seeking damages for his dismissal, which he described as unfair.

The President of the WAEMU Commission has not responded to this request for more than thirty (30) days.

The silence of the appointing authority (the President of the WAEMU Commission) shall constitute an implicit decision to reject within the meaning of Article 60 of the above-mentioned Regulation.

Article 61 of the same Rules stipulates, inter alia, that the appeal must be lodged with the Court within two (2) months of the date of expiry of the time limit for reply, where the appeal relates to an implied decision of rejection.

Before proceeding with our analysis, we must answer the question of whether, by obtaining an order to discontinue the proceedings, Bayon BAKO was required to bring his new action within the time limit set by Article 61 of the aforementioned Rules, failing which it would be inadmissible.

Withdrawal of proceedings merely extinguishes the proceedings in progress. It does not entail a waiver of the action.

Bayon BAKO therefore retained the right to sue, but he had to file his new claim within the original limitation period set out in Article 61 above.

By submitting his new application on 26 February 2003, Bayon BAKO incurred a foreclosure.

In conclusion, on the basis of the foregoing considerations, we suggest that the Court declare the action brought by Bayon BAKO on 26 February 2003 inadmissible and order the Commission of the WAEMU to pay the costs.

The Advocate General

Kalédji AFANGBEDJI

JUDGMENT OF THE COURT**February 18, 2004****Between Mr****Bayon BAKO****And****The WAEMU Commission**

The Court, composed of Mr Yves D. YEHOUESSI, President; Mr Youssouf Any MAHAMAN, Judge-Rapporteur; Mr Daniel Lopes FERREIRA, Judge; Mr Kalédji AFANGBEJI, Advocate General; Mr Raphaël P. OUATTARA, Registrar;

delivers this judgment :

Considering that by application dated 24 February 2003, registered at the Registry of the WAEMU Court of Justice on 26 February under No. 02/03, Mr Bayon BAKO, formerly a labourer at the WAEMU Commission, through Maître Issa DIALLO of the SANKARA-DIALLO law firm, lawyer at the Court, Ouagadougou, Burkina Faso, brought an action for payment of the sum of five million (5,000,000) francs by way of damages for unfair dismissal;

Considering that the applicant was recruited as a labourer at the headquarters of the WAEMU Commission under a fixed-term contract concluded on 16 April 1997 between the President of the Commission and him, in accordance with Regulation No 02/95/CM of 1^{er} August 1995 on the conditions of employment of non-permanent staff of the WAEMU;

That on 28 November 2001 he received a written request for an explanation from the Acting Director of the Secretariat of the WAEMU Commission concerning his repeated lateness in service;

That, in response to this request for an explanation, Mr Bayon BAKO, by letter dated 28 November 2001, pointed out that the delays of which he was accused were untrue, if not exaggerated, or were justified by the fact that the service sent him, in certain circumstances, to collect tickets from travel agencies;

That on 6 February 2002, the President of the WAEMU Commission informed him of a decision to dismiss him for serious misconduct, consisting of repeated lateness in service, with effect from 8 February 2002;

That by letter dated 3 April 2002, Bayon BAKO, represented by his counsel Maître Issa H. DIALLO, lodged an informal appeal with the President of the WAEMU Commission;

Considering that by a first application dated 25 September 2002, Bayon BAKO, represented by Maître Issa H. DIALLO, brought an action against the WAEMU Commission seeking an order that it pay him the sum of five million (5,000,000) francs by way of damages for unfair dismissal;

That in the course of the proceedings and at the request of the applicant, the President of the WAEMU Court of Justice issued an order on 19 February 2003 to strike out the application on the grounds that the proceedings had been discontinued;

On 26 February 2003 he again brought an action before the Court of Justice on the same grounds of unfair dismissal;

Considering that, in support of his action, Mr Bayon BAKO argues that the number of delays of which he was accused was exaggerated and can be explained by the poor relations between him and the security guard responsible for recording the delays;

That the only delays he acknowledges were justified and that his dismissal without any real and serious grounds is unfair and entitles him to compensation;

Considering that, in reply to these pleas in law, the WAEMU Commission, through its counsel, Maître Harouna SAWADOGO, avocat à la cour, considers that Mr Bayon BAKO's application must be declared inadmissible on the grounds that the appeal was made by a lawyer in breach of Articles 107 et seq. of Regulation No 01/95/CM of 1^{er} August 1995 on the Staff Regulations of WAEMU Officials, which make it personal, and for failure to respect the hierarchical procedure;

It also points out that the applicant did not identify the subject of the request and did not allow the competent bodies to analyse his application objectively;

Considering that, in his rebuttals, the applicant considers that his application is admissible by virtue of the general principle of law according to which "a lawyer is entitled to represent any person before the judicial and administrative authorities";

That he maintains that there is a concordance between his informal appeal and his contentious appeal, since they both concern compensation for the damage he suffered as a result of his unfair dismissal by the Commission;

Whereas the Court must rule on its jurisdiction to hear this case and on the admissibility of the action before examining the pleas in law of the parties after having put the questions which it is called upon to answer ;

Considering that the Court's jurisdiction in this case is enshrined in Article 16 of Additional Protocol No. 01 on the supervisory bodies of the WAEMU, Article 15(4^e) of the Rules of Procedure and Article 61 of Regulation No. 02/95/CM of 1^{er} August 1995 on the conditions of employment of non-permanent staff of the Union;

Considering that Mr Bayon BAKO is a contract staff member; that as such he comes under the scheme applicable to non-permanent staff of the Union, a scheme set up by Regulation No 02/95/CM of 1^{er} August 1995;

As regards the admissibility of the action, it should be noted that :

- the appeal was lodged in accordance with the provisions of Article 26 of the Rules of Procedure and that the appellant has paid the security of twenty thousand (20,000) CFA francs set by Order No 01/03 of 18 March 2003;
 - On the other hand, as far as the time limit for lodging an appeal is concerned, Article 61 of Regulation No. 02/95/CM on the regulations applicable to non-permanent staff of the WAEMU has not been respected, in particular paragraph 3, which states: "The appeal must be lodged with the Court within a period of two (2) months, starting from the date on which :
- from the date of publication of the decision,
 - from the date of notification to the employee concerned,

- of the day on which the person concerned became aware of it,
- the date of expiry of the time limit for response, where the appeal relates to an implied rejection decision;

Considering that the decision to dismiss Bayon BAKO dated 6 February 2002 took effect on 8 February 2002;

On 3 April 2002, he lodged an informal appeal with the Commission, which did not reply;

That the action having been brought on 26 February 2003, Mr Bayon BAKO is precluded and his application must be declared inadmissible notwithstanding the intervention in the meantime of his withdrawal from the proceedings;

Whereas a discontinuance of proceedings is an offer made by the plaintiff to the defendant, who accepts it, to discontinue the proceedings without waiting for the judgment or decree;

Once accepted, the withdrawal irrevocably produces its effect, which consists in putting the parties back in the situation they were in before the trial;

Consequently, the limitation period is deemed never to have been interrupted;

That four months after 3 April 2002, there was an implied decision rejecting the application, after which the applicant had two months in which to refer the matter to the Court;

That by bringing an action before the Court on 26 February 2003, Mr Bayon BAKO incurred a foreclosure; his action is therefore inadmissible;

Considering that, as this is a dispute between the Union and its agent, it is appropriate, in accordance with the provisions of Article 61 of the Rules of Procedure, to order UEMOA to pay the costs;

**FOR THESE
REASONS**

The Court, sitting in open court, having heard the parties, in matters relating to the Community Civil Service :

- Declares Mr Bayon BAKO's appeal inadmissible;
- Orders UEMOA to pay the costs.